Bureau of Competition Policy

Speech

S-1141494-02

GETTING DOWN TO BUSINESS: THE STRATEGIC DIRECTION OF CRIMINAL COMPETITION LAW ENFORCEMENT IN CANADA

REMARKS OF

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(CRIMINAL MATTERS)

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INDUSTRY CANADA

INSIGHT AND THE GLOBE AND MAIL CONFERENCE

"EMERGING ISSUES IN COMPETITION LAW"

TORONTO, MARCH 10, 1994

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I INTRODUCTION: THE ENFORCEMENT FRAMEWORK

The purpose of this paper is to discuss the way in which the Bureau of Competition Policy enforces the criminal law provisions of the *Competition Act*, other than those that deal with misleading advertising and deceptive marketing practices. The relevant provisions are found in sections 45 to 51 inclusive and section 61 of the Act. This paper is intended to provide an update on the Bureau's current thinking on enforcement and contribute to a better understanding of the process itself and of the Bureau's rationale for its approach and treatment of criminal matters.

The Bureau's current approach to criminal cases under the *Competition Act* differs dramatically from the approach taken under the predecessor *Combines Investigation Act*. This change in approach was brought about by a number of factors, including an internal reallocation of some of the Bureau resources, shifting them from criminal enforcement to deal with the new civil law responsibilities contained in the 1986 amendments to the law, the impact of the *Charter*[1] on investigation and prosecution procedures and new thinking on the economic welfare consequences of some criminal offences.

As a consequence of these developments, while the Bureau has been undertaking fewer criminal cases, it is doing so with a greater intensity and focus. For example, if one compares the past four years with a like time span a decade ago, the more recent period produced less than one-third the number of corporate criminal convictions of the earlier four-year span, but there was a eight-fold increase in the dollar value of fines.[2]

Criminal competition law enforcement of recent years has involved the development of innovative approaches, mostly procedural in nature, to investigating offences and analyzing evidence.

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1. *Canadian Charter of Rights and Freedoms.*

2. There were 35 corporate convictions in 1991-94 compared to 129 convictions in 1981-84 but total corporate fines of $14.8 million in 1991-94, compared to $1.8 million in 1981-84. See Appendix I for selected operating statistics.

These approaches include the dissemination of guidelines and other materials to promote compliance with the law, the development of case selection criteria which ensure that the Bureau directs its scarce resources to the most important cases, increased use of oral evidence to aid in the detection of covert crimes that are seldom revealed in documentary evidence, and the development of an immunity program designed to aid in the investigative and litigative processes.

The Bureau has been trying to adopt more efficient and effective policies and techniques, with a view to getting the maximum enforcement impact from a resource base which, like that of all government bodies today, is increasingly subject to financial and other constraints. In the sphere of criminal investigation and litigation, this has resulted in the Bureau concentrating on conspiracy and bid-rigging, which inflict broad economic harm on markets. This does not mean that the Bureau considers other criminal matters dealt with under the Act to be unimportant; nor does it mean that investigations of clear offences under other criminal provisions will not be undertaken by the Bureau due to budget or other scarce resource constraints.

While conspiracy and bid-rigging cases will usually attract the bulk of criminal enforcement resources[3] because of their greater economic impact, other criminal matters are pursued as vigorously as possible with the resources available. When circumstances warrant, the Bureau is prepared to deal with some of these cases through what we call alternative case resolution techniques.

For those cases that go to prosecution, the Bureau works closely with the office of the Attorney General to obtain stiffer penalties in order to promote the policy goals of specific and general deterrence for violations of the core criminal provisions. A result of this is the attention paid to individuals who may be guilty of criminal

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3. About two-thirds of the time of the Bureau staff dedicated to criminal matters now focuses on conspiracy and bid rigging matters.

offences under the law. A number of initiatives and proposals are reviewed later in the paper.

The Bureau has issued guidelines in respect of price discrimination and predatory pricing,[4] two of the criminal provisions which have historically engendered a great many requests from the business and legal communities for Bureau opinions about the application of the law. It is hoped that the guidelines serve an educational purpose, informing counsel and others as to the type of behaviour which will trigger inquiry by the Bureau, so that compliance with the law may be easier to achieve.

Finally, another aspect of procedural innovation that deserves mention involves the integration of computers into work management and the analysis of evidence. It is now Bureau routine to apply one of our computer litigation packages to complex cases involving masses of documentary and oral evidence. Computer applications, custom-designed for our work, are also beginning to be used to speed the review of complaints and assist in the productive organization of work.

II ROLES OF DIRECTOR OF INVESTIGATION AND RESEARCH AND ATTORNEY GENERAL OF CANADA

The Director of Investigation and Research is responsible for enforcing the criminal provisions of the *Competition Act*. That responsibility is carried out essentially through the conduct of investigations and inquiries into suspected or reported instances of violations of specific provisions of the Act. Complaints from the general public and the business community are the primary source for much of the Bureau's work.

The investigative powers at the disposal of the Director are considerable, and include powers of search and seizure of documentary and electronic evidence, the power to take sworn oral evidence and depositions, and the power to compel the production of company records.

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4. Sections 50(1)(a) and 50(1)(c), respectively.

The advent of the *Charter* has made attention to appropriate procedures particularly important. Investigations under the criminal provisions of the *Competition Act* are conducted by Bureau officers who take legal advice about investigative procedures and other matters from the Attorney General. The result is that, from the onset, an investigation is conducted with a view to ensuring that any viable case resulting from the investigative efforts will be fully prosecutable; that is:

(a) the investigation will be conducted fairly, impartially and objectively, and with full respect for the rights of the parties under inquiry; and

(b) that all investigative efforts will be directed towards acquiring evidence that will stand the test of scrutiny in our criminal court system.

If, as a result of an investigation or inquiry into a criminal matter, the Director concludes that there is a body of evidence pointing to an offence, the Director refers the matter to the Attorney General, who has the sole authority to determine whether or not charges should be laid. Such prosecutions as may result are carried out by the Attorney General, with the support of the Director's staff.

III CRIMINAL PROVISIONS - CASE SELECTION

Appendix II contains a brief description of the criminal law provisions of the *Competition Act*. Although all of these provisions are considered important, and each attracts some of the scarce enforcement resources of the Bureau, certain provisions are considered to have a higher priority than others.

In deciding how to allocate resources across the range of investigative opportunities available to it at any given time, the Bureau is guided by case screening criteria. The Criminal Matters Branch have developed and refined these criteria over the past few years in an attempt to focus the investigative budget of the Branch on those instances of anti-competitive behaviour which, because of their breadth of application, are the most costly to the Canadian public and the economy at large. Since their first presentation in a 1991 speech by the former Director of Investigation

and Research, Howard Wetston, they have been revised to reflect, among other things, the important jurisprudence by the Supreme Court of Canada in the *PANS* case.[5]

The case screening criteria fall into three categories.

First, there is an assessment of the economic welfare aspects of the case that takes into account the volume of commerce affected by the alleged conduct and the market power of the participants. The assessment also covers the type of behaviour likely to injure the competitive process and the potential for bringing about beneficial change in the markets involved through enforcement action.

Second, the assessment then addresses the extent to which the case would advance the enforcement policy interests of the Bureau. Among these considerations would be: the potential jurisprudential value of the case (would it be likely to break new ground in the application of the law, or bolster or clarify previous case law); the degree of covertness of the behaviour; the extent to which the case would advance Bureau enforcement priorities; and the level of consumer or public sensitivity attached to the issue at hand. All of these factors are given a higher weight than several other factors, which are considered important but less determinative.

Finally, cases are screened according to certain management considerations, chiefly the projected cost in financial and human resources required to see a case through to its conclusion.

Although some price maintenance cases figure prominently, using the case screening criteria as a guide means that much more of the Bureau's criminal enforcement effort is directed towards conspiracy and bid-rigging cases, those very activities that strike at the heart of an otherwise dynamic and efficient market economy by suppressing rivalry among firms and enabling some to function as collective monopolies or cartels. The Supreme Court of Canada recently lauded competition law

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5. *Nova Scotia Pharmaceutical Society* et al. v. The Queen, [1992] 2 S.C.R. 606. See especially the Court's analytical framework explained at pp. 651-658.

for being "central to Canadian public policy in the economic sector," and summed up the conspiracy provision as "one of the pillars" of that law.[6] For these reasons, conspiracy and bid-rigging cases have the highest priority among the criminal provisions of the *Competition Act*, and they are vigorously pursued by the Bureau.

IV CRIMINAL PROVISIONS - INVESTIGATIVE PROCEDURES

Procedurally, the Bureau treats the core criminal cases differently from civil cases. In civil cases, the Bureau's focus is on business practices and market circumstances, which may be subject to Tribunal-ordered or voluntary remedial action to prevent anti-competitive outcomes. Criminal cases emphasize exposing the behaviour of target persons and firms and seek to mete out penalties through the criminal courts as a deterrent to the targets and to the business community from engaging in such practices.

Conspiracy and bid-rigging cases by their nature are more adversarial than civil cases. This is a consequence of the potential liability to the parties and the procedures dictated by the criminal law context. Once such a case has been initiated, there is little scope for the sort of dialogue that routinely takes place between the Bureau and legal counsel in civil cases. The Bureau remains open to the receipt of submissions from counsel for parties under investigation[7] but does not enter into settlement discussions until its investigation is completed. If, after referral, a party wishes to discuss settlement, we will assist the Attorney General as appropriate. The view shared by the Bureau and the Attorney General's office is that if a matter can be settled and the cost of a prosecution reduced or avoided, we should seriously consider that opportunity.

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6. Nova Scotia Pharmacies, Supra, at p. 648. Bid-rigging is a form of conspiracy which Parliament made a *per se* offence in the 1976 amendments to the law.

7. Such as evidence that may have been overlooked which may exonerate the parties or expressions of an intention to plead guilty or request favourable treatment in return for disclosure and cooperation in the Bureau's investigation. The latter may lead to discussions on immunity and an earlier referral of the matter to the Attorney General. See the discussion in the next section of the paper and Appendix III.

However, any resolution must ensure that the public interest in providing a sufficient deterrent to future conduct is satisfied.

The Director's investigative powers are typically exercised without warning. The first indication to a target firm that the Director is conducting a criminal inquiry may be the arrival of Bureau officers, in possession of a search warrant, intent on examining all relevant company records, including data and records stored electronically. During the course of searches, or at a subsequent time, officers of the Bureau may attempt to gather oral evidence from individuals with whom they come into contact. The Bureau has procedures in place which are to be followed when individuals are interviewed with respect to criminal offences. These include notification to those that are the targets of an investigation that they are not required to submit to an interview or to volunteer information to the Director's representatives. Bureau officers also caution that any information which is passed to the Director's representatives may well be used in the course of an inquiry or prosecution.

Searches of company premises may be followed by the taking of oral evidence under oath. It should be noted that increased reliance is being placed by the Bureau on the taking of oral evidence given under oath. This may involve simply taking sworn statements or it may involve formal oral examinations under section 11 of the Act. Section 11 is viewed as an important investigative tool for gathering evidence and assessing the merits of particular cases before any recommendation of prosecution. Where witnesses appear to have committed perjury we have not hesitated to refer the matter to the RCMP to determine whether charges are warranted under section 131 of the *Criminal Code*. Such is the importance accorded to oral evidence in the criminal justice system in general, and by the Bureau in particular.

An interesting statistic disclosed in Appendix I is that, over the past ten years, the use of formal powers has declined in absolute terms.

An important recent development in the field of investigation of criminal matters under the *Competition Act* is the development of cooperation between the

Bureau of Competition Policy and the Antitrust Division of the United States Department of Justice under the auspices of the *Mutual Legal Assistance Treaty* (*MLAT*). Under the terms of the *MLAT*, competition authorities in the two countries assist one another in securing and sharing evidence which, prior to the *MLAT*, would not have been readily obtainable.

Canadian authorities, for example, have recently:

- requested that the United States authorities obtain documentary and testimonial evidence from U.S. corporate offices by compulsory procedures;
- assisted in the execution of search warrants at the premises of a firm in Canada which was allegedly party to felony violations of the United States antitrust laws; and
- provided documentary and other evidence to U.S. authorities, leading to the initiation of grand jury investigations in the United States.

The net effect of the *MLAT* in the context of enforcement is that, with the present cooperative procedures in place, firms in either country should not feel comfortable that their criminal activities will be beyond the reach of either the Bureau of Competition Policy or the Antitrust Division of the United States Justice Department.

Given the extent to which free trade has increased the prospect for trans-border anti-competitive behaviour, investigative cooperation and coordination under the *MLAT* is an important tool which enables antitrust authorities on both sides of the border to deliver better and stronger enforcement of their respective antitrust laws.

V CRIMINAL PROVISIONS - IMMUNITY FROM PROSECUTION

In August 1991 the Bureau launched a program[8] aimed at providing greater incentives for corporations to voluntarily report their participation in conspiracy and bid-rigging activities before they come to the Bureau's attention by way of complaint, or otherwise. Given the covert nature of these offences, they are often difficult to discover or prove without the cooperation of persons who are, or were, themselves implicated in the commission of the offence. We therefore want to do whatever we can, in a manner consistent with the fair and impartial administration of the *Competition Act*, to encourage firms to come forward as soon as possible after it has come to the attention of responsible persons within a firm that the entity has been involved in collusive conduct contrary to the Act.

Clearly the practice of granting immunity from prosecution to corporations and individuals is designed to affect the course of both investigations and prosecutions. Although the Attorney General has the sole discretion to grant immunity, the subject often arises before the existence of an offence is known, and it is typically the Director who learns of the matter first through an approach made by counsel seeking to discuss the possibility of immunity for a client with something to reveal. The Director has more of an operational than a policy role to play in immunity matters; what had been announced in August 1991 was an application of the concept of immunity in the context of competition law.

The 1991 initiative has become known as the "Whistle Blower" program. There have been developments since that time. The Law Reform Commission of Canada released its Working Paper in 1992. The Bureau held a consultative forum on enforcement practices, including immunity, in May 1992. The Department of Justice completed its Crown Counsel Policy Manual, which includes a chapter on Witness

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8. See the speech by the former Director, Howard Wetston, to the Canadian Corporate Counsel Association, Calgary, Alberta, August 19, 1991.

Immunity. The new Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice announced an expansion of the Division's Corporate Leniency Policy in August 1993. And, finally, the Director's Whistle Blower program was put into operation when Abbott Laboratories agreed to a prohibition order issued by the Federal Court of Canada in November 1992.

As a result of these developments and some practical case situations, the Bureau has modified and expanded its approach.

The criteria, identified in 1991 and still in effect, can equally apply to individuals (by substituting the word "person" for "firm") as considerations that will lead the Bureau to recommend immunity when hitherto undetected illegal conduct is disclosed.

However, the condition enunciated in 1991, that a recommendation for immunity would not be forthcoming "if there is an existing complaint or investigation, or if an advisory opinion has already been issued by the Bureau regarding the conduct in question", may, in practice, be too restrictive. There may well be situations where it is appropriate and consistent with the Attorney General's policy on witness immunity for the Director to recommend to the Attorney General immunity after an investigation has commenced, or where there is an existing complaint or advisory opinion. Accordingly where a party, be it a company or an individual, is able to offer important and valuable cooperation, either before or during the course of an investigation, the Bureau would be prepared to consider whether or not it should recommend to the Attorney General immunity from prosecution or another form of favourable treatment. Similar considerations as apply under the Whistle Blower program would guide the Bureau's recommendation in these situations.

In order to understand the process of requesting immunity, Appendix III sets out the modified criteria which guide the Bureau's recommendations to the Attorney General and the steps that are usually followed in receiving and examining a request.

Recommendations by the Bureau, and the granting of immunity to individuals by the Attorney General, have been a feature of matters under the Act for some time. The recent settlement of the *Insecticides* case demonstrates the explosive potential that grants of immunity have for successfully uncovering and punishing criminal anti-competitive behaviour. In the *Insecticides* case, a corporation, Abbott Laboratories, was granted immunity under the Whistle Blower program when it provided evidence of an illegal agreement with another company, Chemagro Limited, to share the biological insecticide market for forest protection in Canada. Later, a former employee of Chemagro was granted immunity from prosecution in return for exposing an unrelated conspiracy,[9] and cooperating in the investigation of this in a separate insecticide market involving a third firm, Sumitomo Canada Limited. When all the convictions were registered, the dollar value of the resolution was in excess of $5 million, comprising over $2 million in restitution payments and $3.25 million in fines.

It is possible for misconceptions to develop about how immunity is handled by the Bureau. It may be useful, therefore, to indicate that the Bureau does not consider immunity to be a replacement for the conduct of investigations using the investigative tools provided by Parliament in the Act. While it is undeniably true that immunity situations confer evidence upon the Bureau (and ultimately, the Attorney General) that may not otherwise come to light, the important thing to remember is that access to immunity proceeds on a voluntary basis. It is not the policy or practice of the Bureau to use the prospect of immunity as a means of soliciting people to reveal to the Bureau information or evidence that they would not otherwise disclose. In short, the Director does not offer immunity; rather, the Director processes requests brought voluntarily.

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9. Leading to the first foreign directed conspiracy conviction (section 46) under the Act.

VI CRIMINAL PROVISIONS - CASE RESOLUTION

More than ever before, the Bureau devotes serious attention to recommending to the Attorney General what may, in the circumstances, be considered an appropriate disposition of a case. In times of diminishing resources, it is important to seize each opportunity to maximize the enforcement impact in each of the cases that are proceeding to prosecution. This emphasis is reflected in the overall approach to penalties and the focus on individual offenders, as explained in this section.

In making recommendations to the Attorney General about the disposition or resolution of criminal cases under the *Competition Act*, the Bureau's primary focus is on deterrence, both specific and general. In the Director's view, sentencing should serve to protect the public interest in free competition by providing sentences sufficient to deter others (general deterrence) as well as the offenders in question (specific deterrence) from committing the offence in the future.

Heavy penalties are prescribed under the law for major offences. The maximum penalty for violating the conspiracy provision is a fine of $10,000,000 or five years imprisonment, or both. Bid-rigging is punishable by a maximum penalty of five years imprisonment, or a fine at the discretion of the court, or both. The same penalty applies to price maintenance offences.

The Bureau's view is that, when justified by the evidence, financial penalties approaching or reaching the maximum financial penalties set out in the law and jail terms are necessary to punish the parties and deter them from repetitions of their criminal behaviour, and to deter others from similar acts. It is useful to note that both corporate and individual fines have increased substantially from the period ten years ago, especially in terms of the average amount per count[10]. This reflects, in part, a greater focus by the Bureau and the Attorney General's office on seeking stiffer

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10. For corporate fines, roughly $420,000 per count, versus $14,000 ten years ago and for individuals, in the order of $70,000 per count, compared to $4,000 ten years ago. See Appendix I.

penalties. While overall the penalty for breaking the law has gone up, the highest fine to date, $1.7 million, is still a long way from the maximum fine of $10 million which Parliament established in 1986. The Director, George Addy, has recently stated that he wants the increase in fines to continue. There have been no jail sentences so far.

As part of the commitment to effective case resolution, the Bureau is in the process of developing internal principles for the purpose of making recommendations on sentencing to the Attorney General. Our objective is to ensure that our recommendations on penalties to the Attorney General are based on a consistent and meaningful set of principles which can be applied to cases that differ markedly in substance and impact.

The Bureau's sentencing principles are not being designed to be a departure from principles that have been around for some time. They will reflect the established jurisprudence. They will not mimic the U.S. Sentencing Guidelines or adopt a mechanistic or rigid approach to sentencing recommendations. In effect, they will represent the pulling together of the relevant considerations in a framework; they will provide a rational guide to case resolution just as the case screening criteria provide a rational guide to case initiation.[11]

An important aspect of deterrence is targeting individuals, not just corporations, for charges and appropriate penalties as supported by the evidence. Relatedly, of the 10 *Competition Act* criminal cases before the courts today, all but two include charges against individuals. In all, 33 individuals face personal charges under the Act. Indicative of the importance attached by the Bureau and the Attorney General to prosecuting individuals is the record in the *Compressed Gas* case where 7 former executives were charged over intervals of a two-year period, beginning in October 1991. To date six have pleaded guilty and been fined a total of $425,000.

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11. See the comments of the Director, George Addy, on the sentencing principles project in his speech to the National Competition Law Section of the Canadian Bar Association, Vancouver, British Columbia, October 1, 1993.

An issue that we have not yet addressed is whether individuals convicted and fined under the law should be allowed to have their fines paid by the corporation they may represent rather than paying them personally. Obviously, the deterrent effect of personal payment is greater. We have asked the Attorney General to explore what legal mechanisms are possible to require personal payment.

Another development which reflects the Bureau's policy approach to individuals relates to extradition. As some of you may be aware, indictable offences under the *Competition Act* were effectively added to the *Extradition Treaty* between Canada and the United States in November 1991. The Attorney General intends to apply shortly for extradition against three U.S. residents in one of our ongoing cases. We will continue to recommend extradition, where circumstances warrant it.

A further area that we are studying is the practice of fingerprinting those charged under the Act. The *Identification of Criminals Act* provides that any person charged with or under conviction of an indictable offence may be subjected to fingerprinting processes. The particular implication of adopting this practice is that those charged would be registered in the Canadian Police Information Computer (CPIC) which may result in restrictions on their ability to travel internationally while charges are pending.

Finally, to date, the possibility of a jail term for offences under the *Competition Act* has not been seriously viewed by business executives, despite the fact that this penalty has been available under the law for some time. The Bureau has now turned the corner on this issue, and in two recent cases, we have recommended that the Attorney General seek imprisonment for persons we believe have committed serious offences.[12] This development will not come as a surprise to those who are aware of

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12. We have the recent precedent in a misleading advertising case last year where the court placed an executive on six months probation during which he must perform 60 hours of community service. See *R. v. Goodman's China and Gift Store Ltd.* (unreported) July 28, 1993 Ont. Ct. (Prov. Div.).

the record of incarceration for *Sherman Act* offences in the United States and who have noted Mr. Justice La Forest's comments in the *Thomson* case.[13]

While outside of the scope of recommendations by the Bureau, it is noteworthy that the Attorney General may independently seek leave to lay fraud charges under section 380 of the *Criminal Code* for some forms of collusive conduct. This would significantly increase the liability facing individuals: the penalty for a section 380 conviction is a term of imprisonment of up to ten years.

By taking this tough approach to the treatment of individuals involved in criminal conduct, it is expected that greater compliance with the law will result.

In addition to the penalties that may be levied by the courts against firms and individuals, it is common for the Director to recommend to the Attorney General that the courts issue a prohibition order detailing the types of behaviour in which firms and individuals are ordered not to engage or repeat. A prohibition order is seen as part of the package of penalties which the court may impose, and as a useful additional deterrent to engaging in anti-competitive behaviour.

Traditionally, the Bureau has taken the view that prohibition orders alone are not a satisfactory resolution of criminal cases, although there have been isolated examples of such case resolutions in the past. These have tended to occur where the facts of a case were not considered to be as strong as they might be, or the anti-competitive harm which could be measured was slight or negligible, or the jurisprudence value of the case may have been considered low or inconsiderable, or for a variety of other reasons pointing to a prohibition order alone being a reasonable resolution of the matter.

This approach is not available in the face of strong evidence of an offence, with demonstrable economic harm, where the jurisprudence strongly supports proceeding

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13. *Thomson Newspapers Ltd. v. Director of Investigation and Research and Restrictive Trade Practices Commission*, [1990] 1 S.C.R. 425 at pp. 508-517.

against the behaviour in question, or where the case offers the opportunity to expand or clarify existing jurisprudence. In such cases, parties to an alleged criminal offence under the Act may expect instead a tenacious and thorough process of investigation leading (where warranted) to strong recommendations to the Attorney General from the Director seeking the application of the full range of penalties provided by the law.

VII CONCLUSION

Criminal interference in the workings of competitive markets represents a hidden tax levied by unauthorized private firms and individuals on the Canadian economy at large. It adversely affects the prices paid by governments, businesses and consumers for the goods and services they buy, and has harmful effects on the domestic and international competitiveness of victimized Canadian firms and industries. Investigations are therefore conducted with vigour and determination, leading to aggressive prosecution designed to produce both specific and general deterrence effects in the business community.

The enforcement approach of the Bureau has become more focused in recent years with respect to the selection of cases and targets and the quest for more appropriate sentencing. This is a continuing process which the Bureau of Competition Policy intends to hone and refine even further in its attempt to improve its effectiveness.

APPENDIX I

SELECTED STATISTICS
CRIMINAL MATTERS (NON-MARKETING PRACTICES)

	1981-84[1]	1991-94[1]
NUMBER OF INQUIRIES	243	135
EXERCISE OF FORMAL POWERS UNDER SECTION 11[2]	21	4
EXERCISE OF FORMAL POWERS UNDER SECTION 15[2]	45	19
CORPORATE CONVICTIONS[3] UNDER SECTIONS 45, 46 & 47[2]	48	23
CORPORATE CONVICTIONS[3] UNDER SECTIONS 50 & 61[2]	81	12
INDIVIDUAL CONVICTIONS UNDER SECTIONS 45, 46, 47, 50 & 61[2]	4	6
TOTAL CORPORATE FINES[4]	$1,842,143	$14,813,000
TOTAL INDIVIDUAL FINES	$17,000	$425,000

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1 For the fiscal years ending March 31, except for 1994, which ends as of the date of the presentation, March 10, 1994.

2 Or the equivalent provision prior to 1986.

3 Includes the number of counts against each convicted party. Where a conviction was upheld by an appeal court, it is recorded in the period where the conviction was originally registered.

4 Where sentencing took place after conviction, the fine is recorded in the period when the conviction was originally registered. Similarly where a fine was changed by an appeal court, it is recorded in the period when the conviction was originally registered.

APPENDIX II

A BRIEF OUTLINE OF THE CRIMINAL PROVISIONS OF THE *COMPETITION ACT*[14]

Part VI of the *Competition Act* prohibits under criminal sanction specified trade practices, bid-rigging, agreements or arrangements which lessen competition unduly, misleading advertising and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 51 and section 61, which may be loosely characterized as offences in relation to competition, are treated separately from the misleading advertising and deceptive marketing practices provisions found in section 52 through 60. The following offences are included in this group:

- Conspiracies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product (section 45);
- Bid-rigging, where two or more persons agree that one party will refrain from bidding in a call for tenders, or where there is collusion in the submission of bids, unless such actions are made known to the tendering authority (section 47);
- Knowingly engaging in a practice of discriminating against competitors of a purchaser of an article by granting a discount or other advantage to a purchaser that is not available to competitors purchasing articles of like quality and quantity (paragraph 50(1)(a));
- Engaging in a policy of selling products in any area of Canada at prices lower than those exacted elsewhere in Canada, where the effect or design is

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14. Excluding those provisions dealing with misleading advertising and deceptive marketing practices.

to lessen competition substantially or eliminate a competitor (paragraph 50(1)(b));

- Engaging in a policy of selling products at unreasonably low prices where the effect or design is to lessen competition substantially or eliminate a competitor (paragraph 50(1)(c));
- Granting to a purchaser an allowance for advertising or displays purposes that is not offered on proportionate terms to competing purchasers (section 51);
- Attempting to influence upward or to discourage the reduction of the price at which another person supplies or advertises a product or refusing to supply or otherwise discriminating against anyone because of that person's low pricing policy (subsection 61(1));
- Attempting to induce a supplier to refuse to supply a product to a particular person because of that person's low pricing policy (subsection 61(6)).

Other provisions relate to the implementation of foreign directives (section 46), agreements relating to participation in professional sport (section 48) and agreements among banks (section 49). A number of exclusions and exceptions are applicable to these provisions, as well as certain defences. For greater certainty, readers are advised to consult the legislation.

APPENDIX III

IMMUNITY FOR OFFENCES UNDER THE COMPETITION LAW IN CANADA

1. INTRODUCTION

Those involved in activities that may violate the criminal law provisions of the *Competition Act* may approach the Bureau of Competition Policy to disclose the information they have and cooperate with an investigation by the Bureau and any ensuing prosecution or other legal proceedings in return for the Bureau recommending to the Attorney General of Canada favourable treatment.

The subject of immunity for offences under the *Competition Act* was first addressed in a speech by the then Director of Investigation and Research, Howard Wetston, in August 1991. It was meant to provide guidance on corporate immunity, particularly in the context of corporations informing and cooperating on offences that had not yet been detected by the Bureau -- the so-called "Whistle Blower" program.

In November 1992, the Whistle Blower program was put into operation when Abbott Laboratories agreed to a prohibition order issued by the Federal Court of Canada after satisfying the criteria set out in the August 1991 speech.

The Bureau has now modified and expanded its approach when a request for immunity is received: (1) to include individuals and, (2) not to limit consideration to applications before an offence has been detected by the Bureau.

2. DEFINITION

Immunity from prosecution is but one possible form of favourable treatment that the Director may recommend to the Attorney General.

Favourable treatment means any penalty or obligation that is less severe than one which would be sought in the absence of disclosure and cooperation by the party

who may have contravened the criminal law provisions of the Act. In practical terms, this involves a (joint) submission to the court recommending:

- acceptance of a guilty plea, a prohibition order under section 34(1) of the Act and a lesser fine or period of incarceration than would be otherwise sought, or
- a prohibition order under section 34(2) of the Act and a grant of immunity from prosecution under the *Competition Act* and *Criminal Code*.

3. ROLES OF THE BUREAU AND ATTORNEY GENERAL

The Bureau and the Attorney General have separate responsibilities in their consideration of a request for immunity. The Bureau is charged with investigating matters under the Act, and referring the evidence, along with recommendations, for the Attorney General's consideration. The Attorney General has the sole discretion as to the disposition of a matter, including whether to grant immunity from prosecution or to seek other forms of favourable treatment from the courts. The two offices work closely in considering such requests.

The principal role of the Bureau is to investigate, verify and advise the Attorney General on whether the party requesting immunity has satisfied the relevant considerations.

Though historically the decisions of the Attorney General in assessing the public interest in the competition law area are independent, the Attorney General has given careful and serious consideration to, and received guidance from, the Bureau's assessment and recommendations.

4. CONSIDERATIONS LEADING TO THE DIRECTOR'S RECOMMENDATION OF IMMUNITY

As explained above, immunity is only one form of favourable treatment. Where some of the considerations for immunity are not met, the Bureau may still recommend

to the Attorney General some type of favourable treatment. The Bureau's current approach to requests for immunity is as follows:

(1) where an **individual** or **firm** approaches the Bureau **before** an investigation has commenced and the considerations set out below are satisfied, the Bureau will recommend immunity to the Attorney General.

Before an Investigation (Whistle Blower) Considerations

1. The person must be the first to approach the Bureau with evidence of the offence in question before an investigation has been initiated.
2. The person must provide full and frank disclosure of the facts at its disposal. There must be no misrepresentation of the material facts, which shall be confirmed by the Bureau's investigation. In particular, the Bureau's investigation should not reveal offences beyond those which have been identified by the person.
3. The person must co-operate fully with the Bureau's investigation and with any ensuing prosecution or other legal proceedings.
4. The evidence provided by the person must be important and valuable in the context of any prosecution or other legal proceedings.
5. The person must be prepared to make restitution commensurate with the facts and its responsibility in the matter.
6. The evidence must confirm that the person took immediate steps to terminate the activity and report it to the Director as soon as it was discovered.
7. A prior record of anti-trust violations by the person will be a significant factor in deciding whether to recommend immunity to the Attorney General.
8. The person should usually be prepared to consent to the issuance of an order of prohibition of fixed duration under section 34(2) of the *Competition Act* pursuant to which the commission of an offence is admitted.

9. The role of the person in the conduct in question will also be considered. For example, it may not be consistent with responsible enforcement of the Act or the administration of justice to recommend immunity for the instigator of criminal conduct.

(2) where an individual or firm approaches the Bureau after an investigation has commenced, if the considerations set out below are satisfied, the Bureau may recommend immunity to the Attorney General.

Post-Investigation Considerations

The same considerations as above apply, except that criterion # 1 does not require that the approach be made before an investigation has been initiated.

5. PROCEDURES

Step 1: Initial Contact

The request for immunity usually starts with contact being made with the Bureau to request a meeting to discuss the possibility of receiving immunity for an offence under the Act.

Step 2: Meeting

The first meeting usually takes place between counsel for the person seeking immunity and representatives of the Bureau and the Attorney General. An agreement is usually arrived at on how the information disclosed may be used. This meeting is typically held on a "without prejudice" basis and leads to a "proffer" of information.

Step 3: Proffer

Typically the immunity request will be couched in terms of a "proffer" of the information that could be provided if the Bureau were prepared to entertain a

recommendation of immunity to the Attorney General. The first proffer may be expressed in hypothetical terms. If the Bureau advises that it would be prepared to make a positive recommendation, subject to learning in more specific terms what will be disclosed, successive and more detailed proffers take place.

Step 4: Conditions for Immunity

If it is decided that the proffered information can form the basis for considering immunity, an agreement is entered into that sets out the conditions for the granting of immunity. These conditions generally incorporate the considerations set out in section 4 above, with allowance for the circumstances of particular situations.

Step 5: Investigation and Verification

The person or persons who would be provided immunity are interviewed under oath and their evidence compared and evaluated against the evidence already amassed. Documentary evidence provided by the person or persons is reviewed and tested against existing evidence. A careful assessment to determine whether the nature of the information and the conduct of the person satisfies the conditions for immunity.

Step 6: Bureau Recommendation

If the Bureau is satisfied that the person seeking immunity has satisfied the conditions agreed to, a positive recommendation is made to the Attorney General. Alternatively, the Bureau may recommend a lesser form of favourable treatment or none at all.

Step 7: Immunity Agreement

If the Attorney General accepts the Bureau's recommendation for immunity, an immunity agreement is made.